

**CENTEX BATESON
CONSTRUCTION CO., INC.**

CONTRACT NO. V101C-1567

VABCA-5166-5224

**VA MEDICAL CENTER
HOUSTON, TEXAS**

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**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
INTRODUCTION**

Appellant, Centex Bateson Construction Company, Inc. ("Bateson"), on behalf of its electrical subcontractor, Dynaletric Company ("Dynaletric"), the real party in interest, has timely appealed the Department of Veterans Affairs' ("VA" or "Government") denial of its claim for labor inefficiencies and other impact costs arising out of Contract No. V101C-1567 ("Contract") for the construction of the Department of Veterans Affairs Medical Center in Houston, Texas ("VAMC Houston"). Dynaletric has filed a MOTION FOR PARTIAL SUMMARY JUDGMENT asserting, based on alleged undisputed material facts, that certain of the plans and specifications for the construction of VAMC Houston, as a matter of law, were defective. The Government opposes Dynaletric's MOTION on the basis that there are disputed material facts concerning whether or not the specifications were defective.

Dynaletric's claims arising from the VAMC Houston Contract rest on 1,561 separate "events" consisting of various unilateral and bilateral contract changes, requests for information ("RFI"), requests for proposals ("RFP") and alleged constructive changes. The Board has grouped these "events" into 63 appeals and consolidated them into five separate groups for hearing. The Board has previously denied a MOTION FOR PARTIAL SUMMARY JUDGMENT filed by Dynaletric and the VA's CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT in 5 of the 63 appeals in *Centex Bateson Construction Co., Inc.*, VABCA Nos. 4613, 5162-65, 97-1 BCA ¶ 28,915 ("*Centex I*"). In that decision, the Board deferred ruling on the Dynaletric's MOTION FOR PARTIAL SUMMARY

JUDGMENT as it pertained to the remainder of the appeals. Thus, for the purposes of this decision, the Board will consider the Dynalectric's MOTION as it relates to the 58 appeals and 173 of the 1,456 "events" within the scope of those appeals as set forth in the MOTION. The VA has not cross moved for partial summary judgment in this proceeding.

The record before the Board consists of the consolidated Complaint and Answer in these appeals, cited as "Cmplnt. ¶ ___" or "Answr. ¶ ___"); the consolidated Appeal Files for these appeals consisting of 3,564 exhibits cited as (R4, tab ___); Dynalectric's MOTION FOR PARTIAL SUMMARY JUDGMENT which includes 136 exhibits (cited as "MSJ Exh. ___"); the VA's OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT which includes 7 supporting exhibits (cited as "OMSJ Exh. ___"); and, Dynalectric's RESPONSE TO THE VETERANS AFFAIRS OPPOSITION TO APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT which includes 97 supporting exhibits (cited as "RMSJ Exh. ___"). The Board has recently closed the hearing in the appeals in VABCA Nos. 4613, 5162-65 which were the appeals within the scope of the Board's consideration in *Centex I*; however, the record pertaining to those appeals as developed through the hearing will not be considered for the purposes of our decision here.

Dynalectric claims a total of \$222,847 for the 173 events within the scope of our consideration here. This total is comprised of amounts claimed for: 1) direct costs of the change; 2) costs associated with having to "go-back" to completed areas; 3) costs associated with having to "stop" work because of defective drawings and specifications; 4) "office" costs for reviewing and preparing Requests for Information ("RFI"), Requests for Proposals ("RFP"), and Contract changes; and, 5) additional labor costs resulting from the cumulative impact of Contract changes. (Cmplnt. ¶ 58, Exh. 1) Dynalectric asks only that the Board issue a judgment that the drawings and specifications involved in the 173 events are defective.

DISCUSSION

We will grant summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party carries the burden of showing that there is no genuine issue of material fact. All doubts over whether a genuine factual dispute exists will be resolved in favor of the nonmovant. *Centex I*, 97-1 BCA ¶ 28,915; *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd*, 991 F.2d 810 (Fed. Cir. 1993) (Table); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Our role in deciding a motion for summary judgment is to determine whether a genuine triable issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A nonmovant may not establish the existence of a genuine, triable issue of material fact simply by challenging a fact or by an unsupported conclusion. The nonmovant must present sufficient evidence, by pointing to some part of the record or additional evidence, indicating that the facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the nonmovant, could decide in favor of the nonmovant. *Centex I*, 97-1 BCA ¶ 28,915; *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235; *Hengel Associates*, VABCA No. 3921, 94-3 BCA ¶ 27,080; *C. Sanchez and Son, Inc.*, 6 F.3d 1539 (Fed. Cir. 1993). In deciding a motion for summary judgment, we initially determine if there are material facts in dispute; we will not weigh the facts and evidence. Only when there are no material facts in dispute do we look at whether the movant is entitled to judgment as a matter of law.

Dynalectric's MOTION rests on its assertion that the VA, undisputedly, has "admitted" that the Contract plans and specifications relating to the "events" within the scope of these appeals were defective by virtue of six letters, dated between February 1988 and November 1990, from the VA to its architect-engineer ("A/E") which identify the 173 "events" under consideration here as either "Code A - Design Error" or "Code B - Design Omission" and by the fact that the VA issued Contract changes regarding the events. (MSJ Exhs. 4-9; RMSJ Exhs. 2-97)

The letters cited by Dynalectric were sent to the A/E pursuant to a VA Office of Facilities Memorandum, "Policies And Procedures For Evaluation Of Architect-Engineer Project Performance And For Determining Architect-Engineer Liability For Design and Construction Services." The purpose of the memorandum was to set forth the VA procedures for evaluating the performance of the VA's A/Es and to assist in the enforcement of the RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR clause (48 CFR 52.236-23) included in the VA's A/E contracts. As a matter of practice, the A/E evaluation procedures worked as follows: 1) A VA resident engineer on a project site prepared a Memorandum for Record (MFR) explaining a contract change and the negotiations with the construction contract and forwarded the contract change documents and MFR to a "project manager" in the VA Central Office. The project manager would then assign one of 8 codes to the change, identifying it by type. This information would then be reviewed, along with other A/E contract information, to determine if the VA had a basis to pursue a

claim against an A/E under the RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR clause and to evaluate the performance of the A/E for the VA's use in awarding future A/E contracts. (R4, tab 2221; MSJ Exhs. 4-9; OMSJ Exhs. 4, 5 ,7)

The VA disputes neither that the six letters were prepared with regard to the A/E for the Houston VAMC nor that Contract changes were executed relating to the events within the scope of our inquiry here. However, the VA disputes that the letters to the A/E are an admission that the drawings and specifications for the events were defective. The VA avers that the letters were not intended as the VA's objective, final assessment of whether a Contract change was caused by defective drawings and specifications. In support of its position, the VA submits evidence that these letters were issued by a project manager in Washington, D.C. as part of the VA's internal A/E contractor quality control and as part of an internal system to track project costs. These letters and other documents generated in this quality control process are also intended for possible use in the VA's assertion of claims against an A/E under Federal Acquisition Regulation clause 52.236-23, RESPONSIBILITY OF THE ARCHITECT ENGINEER. The VA has provided evidence, also prepared in the course of the VA's internal quality control process for the A/E contract, that it rated the overall performance of the A/E for the VAMC Houston project as satisfactory or better and that it has asserted no claims against the project A/E under the RESPONSIBILITIES OF ARCHITECT ENGINEER clause. Thus, in the face of this other evidence, the VA contests Dynalectric's conclusion that the letters issued to the A/E establish that the Contract plans and specifications were defective. (OMSJ Exhs. 4, 5 ,7)

In its MOTION, Dynalectric points to the fact that thousands of RFIs and hundreds of changes were involved in the Contract as further support of its contention that the drawings and specifications were defective. However, in its RESPONSE TO THE VETERANS AFFAIRS OPPOSITION TO APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, Dynalectric makes it clear that it is now asserting only that the plans and specifications relating to the 173 events at issue here are defective. The VA reviews the events with which we deal here in detail and provides evidence that the changes involved were either minor in nature, resulted from the VA's determination to change a particular part of the work to meet its needs, or were work that could not be identified until construction had begun. (OMSJ Exhs. 1-4)

The VA has successfully brought into question whether the letters to the A/E serve as un rebuttable "admissions" that the plans and specifications for the VAMC Houston project were defective or whether the events within our

purview in these appeals involved "defective" plans and specifications. In addition to successfully showing the existence of a valid factual dispute as to whether the six letters relied upon by Dynalectric conclusively establish that the relevant plans and specifications were defective; the VA also validly shows that the parties are in dispute as to the facts pertaining to whether there were errors or omissions in the plans and specifications for the events at issue and whether any errors or omissions render the plan and specifications "defective." The fact that there may have been errors or omissions in the Contract plans and specifications and that the VA issued Contract changes for the events at issue here does not necessarily mean that the plans and specifications are "defective." When used in the context of Government construction contracts, "defective" is a term of art which may impose severe consequences on the preparer of the plans and specifications. In this context, it is a term which is not properly applied without extensive factual findings. As such, determining whether these plans and specifications are "defective" involves evaluation of the nature of the work involved, the number of contract changes, and the specifics of each change. *United States v. Spearin*, 248 U.S. 132 (1918); *J.W. Bateson Company, Inc.*, VACAB No. 1148, 79-1 BCA ¶ 13,573; *Santa Fe, Inc.*, VABCA No. 1902, 86-1 BCA ¶ 18,522. The VA has put forth sufficient facts for us to conclude that a valid dispute exists as to the facts pertaining to making such a determination.

Therefore, there are triable issues of material fact as to whether the plans and specifications were defective. Consequently, Dynalectric is not entitled to the partial summary judgment it seeks.

DECISION

For the foregoing reasons, Appellant's, Centex Bateson Construction Company, Inc., MOTION FOR PARTIAL SUMMARY JUDGMENT in the appeals in VABCA Nos. 5166-5224 under Contract No. V101C-1567 is **DENIED**.

DATE: **September 8, 1997**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

GUY H. MCMICHAEL III

JAMES K. ROBINSON

Chief Administrative Judge

Administrative Judge